80-6017

IN THE HONORABLE

SUPREME COURT OF THE UNITED STATES

_____TERM.1981

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RICHARD PAYTON, PETITIONER PLAINTIFF

-VS-

DAVID R.HARRIS,
RESPONDENT DEFENDANT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER PLAINTIFF

APPEARANCE:

PRO SE:RICHARD PAYTON.78 A 0098
GREEN HAVEN CORR.FACILITY
DRAWER B.
STORMVILLE NEW YORK,12582

INMATE LEGAL ASS'T:OLIVER GIOLA WEST JR.76 A 0178
GREEN HAVE CORR.FACILITY
DRAWER B.
STORMVILLE NEW YORK,12582

ISSUES PRESENTED FOR REVIEW HEREIN

I

Whether the plaintiff states a cause of of action from which relief can be granted .When defendant denied plaintiff the equal protection of the law and the due process clause(Fourteenth Amendment,Sections one and five),A pre transfer hearing,etc, under color of state law(Articles I,IV(d) and IX(7)embodied in the Interstate Agreement Detainer Act).,C.P.L.580.20(New York).

II

Whether the hearsay evidence submitted by the defendant in support of their motion to dismiss establishes the absence of a material issue of fact or even contains probative material contradicting plaintiff's claim.

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I

Whether plaintiff states a cause of action from which relief can be granted.When defendant denied plaintiff the Equal Protection of TheLaw and the Due Process Clause(Fourteenth Amendment, Sections one and five),a pre transfer hearing, etc,under color of state law(Articles I,IV(d) and IX(7) embodied in the " Interstate Agreement on Detainer Act.",C.P.L.580.20(New York).....8.

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In The Honorable 80-6017

Supreme Court Of The United States

_____ Term. 1981

Richard Payton,

Petitioner-Plaintiff

-Vs-

David R. Harris,

Respondent-Defendant

On Petition For A Writ Of Certiorari
To The
United States Court Of Appeals
For The Second Circuit

The Petitioner-Plaintiff, Richard Payton., Prays (Under the integrity of our American Jurisprudence, which purports to be one of Justice) that a Writ of Certiorari issue to Review the opinions and Judgment of the United States Court of Appeals, for the Second Circuit, Rendered in the Proceedings on, November 18th 1980 (Rehearing Denied). The Formal opinion, Rendered October 15th 1980.

Opinions Below

The opinion of the Court of Appeals, Denying Rehearing (November 18th 1980), Appears at Exhibit A, infra at page 0; the Formal opinion of the Court of Appeals (October 18th 1980), As yet Unreported, Appears at Exhibit A, infra at pp. 1-3.

The opinions of the District Court, Granting Defendant Renewal Motion to Dismiss (February 23, 1980), Appears at Exhibit 1; the District Court opinion, Denying Defendant's Motion to Dismiss (November 13th 1979),

APPEARS AT EXHIBIT 2, INFRA AT PP. 1-4.

JURISDICTION

THE ORDER OF JUDGMENT OF THE COURT OF APPEALS, WAS INITIALLY RENDERED OCTOBER 15TH 1980 (EXHIBIT A, INFRA AT PP. 1-3), AND THEREAFTER, ENTERED ON NOVEMBER 18TH 1980 (REHEARING DENIED) (EXHIBIT A, P.O). THIS PETITION FOR CERTIORARI WAS FILED LESS THAN NINETY (90) DAYS FROM THE DATE AFORESAID (DENYING OF THE REHEARING). THE JURISDKTION OF THIS COURT IS INVOKED UNDER TITLE 28 U.S.C. SECTION 1254(1).

QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS ("IN AFFIRMING THE DISTRICT COURT, DISPUTABLE DECISIONS) ERRED IN ITS DECISION ERRONEOUSLY, IN THE EXPANDING OF ARTICLES I, IV(d), AND IX EMBODIED IN THE "INTERSTATE AGREEMENT ON DETAINER ACT". THE QUESTIONS THEREBY ARISING ARE:

1. WHETHER PLAINTIFF STATE A CAUSE OF ACTION FROM WHICH RELIEF CAN BE GRANTED. WHEN DEFENDANT DENIED PLAINTIFF THE EQUAL PROTECTION OF THE LAW AND THE DUE PROCESS CLAUSE (FOURTEENTH (14TH) AMENDMENT, SECTIONS ONE(1) AND FIVE(5)), UNDER COLOR OF STATE LAW (ARTICLES I, IV(d), AND IX(a) EMBODIED IN THE "INTERSTATE AGREEMENT ON DETAINER ACT". C.P. L. 580.20).

2. WHETHER THE HEARSAY EVIDENCE SUBMITTED BY DEFENDANT IN SUPPORT OF THEIR MOTION TO DISMISS ESTABLISHES THE ABSENCE OF A MATERIAL ISSUE OF FACT OR EVEN CONTAINS PROBATIVE MATERIAL CONTRADICING PLAINTIFF'S CLAIM.

STATUTES WHICH ARE INVOLVED

UNITED STATES CONSTITUTION

FOURTEENTH (14TH) AMENDMENT; SECTIONS ONE(1) AND FIVE(5):

(1) "... NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY... WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS";

(5) "THE CONGRESS SHALL HAVE POWER TO ENFORCE, BY APPROPRIATE LEGISLATION, THE PROVISIONS OF THIS ARTICLE."

NEW YORK STATE CRIMINAL PROCEDURE LAW

C.P.L. 580.20 (TEXT OF INTERSTATE AGREEMENT ON DETAINERS ACT):

ARTICLE I ..... EXHIBIT 3.
ARTICLE IV(d) ..... EXHIBIT 3.
ARTICLE IX(7) ..... EXHIBIT 3.

PRELIMINARY STATEMENT

PRO SE PLAINTIFF, RICHARD PAYTON, A PRISONER WHO RESIDED AT THE GREEN HAVEN CORRECTIONAL FACILITY BROUGHT A CIVIL RIGHTS ACTION SEEKING INJUNCTIVE AND DECLARATORY RELIEF, AS WELL AS MONETARY DAMAGES (COMPENSATORY, PUNITIVE, AND NOMINAL) UNDER TITLE 42 U.S.C. 1983; TITLE 28 U.S.C. SECTIONS 1331, 1343, 2201 AND 2202, CLAIMING THAT DEFENDANT (DAVID R. HARRIS) WARDEN OF THE ABOVE SAID CORRECTIONAL FACILITY, DEPRIVED PLAINTIFF OF THE EQUAL PROTECTION OF THE LAW, AS WELL AS THE DUE PROCESS CLAUSE (14TH AMENDMENT, SECTIONS ONE AND FIVE) UNDER COLOR OF STATE LAW (ARTICLES I, IV(d) AND IX(7) OF THE C.P.L. 580.20 "TEXT OF THE INTERSTATE AGREEMENT ON DETAINER ACT"), ARISING FROM PLAINTIFF'S INVOLUNTARY TRANSFER (UNLAWFUL) FROM GREENHAVEN CORRECTIONAL FACILITY IN NEW YORK, BEING SENT TO NEW JERSEY FOR TRIAL ON CRIMINAL CHARGES.

PLAINTIFF SUBMITS THIS PETITION FOR WRIT OF CERTIORARI TO REVIEW THE OPINION RENDERED BY THE COURT OF APPEALS ON OCTOBER 18TH 1980, REHEARING DENIED, NOVEMBER 13TH 1980 (EXH. A. PP. 0-4), AFFIRMING THE DISTRICT COURT

RENEWED MEMORANDUM DECISION RENDERED FEBRUARY 21ST 1980 (EXH. 1).

PROCEEDINGS BELOW

THE COURT OF APPEALS

THE COURT OF APPEALS "DID NOT DISCUSS" WHETHER THERE WAS A "PROCEDURAL DUE PROCESS VIOLATION", UNDER COLOR OF STATE LAW (ARTICLES CITED HEREIN OF THE INTERSTATE AGREEMENT ON DETAINER ACT) ARISING FROM PLAINTIFF "UNLAWFUL INVOLUNTARY TRANSFER" FROM GREEN HAVEN CORRECTIONAL FACILITY (NEW YORK), BEING SENT TO NEW JERSEY FOR TRIAL ON CRIMINAL CHARGES (EXH. A. P. 2).

INSTEAD, THE COURT OF APPEALS HAS EXPANDED THE "ARTICLES" CITED HEREIN OF THE INTERSTATE AGREEMENT ON DETAINER ACT (UNDER COLOR OF STATE LAW) (EXH. A. PP. 0-3) IN THE AFFIRMANCE OF THE "DISTRICT COURT RENEWED DECISION" (EXH. 1), FURTHER STATING:

> "APPELLANT CONCEDES THAT THE ONLY ISSUES WHICH WOULD HAVE BEEN OPEN IN THE PRE-TRANSFER HEARING HE WAS ALLEGEDLY WRONGFULLY DENIED UNDER THE DETAINER AGREEMENT WERE WHETHER HE HAD BEEN SUBSTANTIALLY CHARGED WITH A CRIME IN THE DEMANDING STATE (NEW JERSEY), WHETHER HE WAS A FUGITIVE FROM THAT STATE, WHETHER THE REQUIRED PAPERS WERE IN ORDER AND HE WAS IN FACT THE PERSON BEING CHARGED (CITE OMITED). GIVEN THE VERDICT IN NEW JERSEY, HOWEVER, ALL OF THESE ISSUES MUST BE DEEMED SUBSTANTIALLY RESOLVED APPELLANT, INDICATING THAT EVEN IF HE HAD BEEN AFFORDED A PRE-TRANSFER HEARING IT WOULD NOT HAVE AFFECTED HIS CURRENT STATUS, A CONCLUSION REINFORCED BY THE FAILURE OF APPELLANT'S COUNSEL[1] TO TAKE ADVANTAGE OF THE HEARING IN NEW YORK ON NOVEMBER 3, 1978." SEE: EXH. A. P. 3.

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1. NOT ONLY WAS PLAINTIFF "UNLAWFUL INVOLUNTARY TRANSFER" FROM THE STATE OF NEW YORK, SENT TO NEW JERSEY (PRIOR TO THE HEARING WHICH WAS SCHEDULE BY THE NEW YORK COURT). PLAINTIFF WAS NOT APPOINTED COUNSEL TO CONTEST THE PRE-TRANSFER HEARING, WHEN REQUESTED TIMELY (UNDER COLOR OF STATE LAW), SEE: ARTICLE IV(c) OF THE INTERSTATE AGREEMENT DETAINER ACT.

THE COURT OF APPEALS, FURTHER CONCLUDED THAT THE PLAINTIFF:

"APPELLANT ALSO CLAIMS THAT THE NOTICE PROVISIONS OF THE DETAINER AGREEMENT WERE VIOLATED AND THAT THE DISTRICT COURT ERRED IN DISMISSING HIS COMPLAINT ON THE BASIS OF EXHIBITS OFFERED BY APPELLEE, WHICH INDICATED ON THEIR FACE THAT APPELLANT "REFUSE TO SIGN" THE WRITTEN NOTICES OF HIS RIGHTS UNDER THE AGREEMENT. ALTHOUGH THESE DOCUMENTS BY THEMSELVES MIGHT NOT HAVE BEEN SUFFICIENT TO SUSTAIN THE GOVERMENT'S MOTION, THE ADDITIONAL EVIDENCE IN THE RECORD OF APPELLANT'S FAMILIARITY WITH THE PROCEDURES OF THE AGREEMENT, INCLUDING HIS REPEATED REQUESTS FOR COUNSEL AND HIS AUGUST 27, 1978 LETTER TO THE GOVERNOR OF NEW JERSEY, PROVIDE PERSUASIVE EVIDENCE THAT APPELLANT WAS IN FACT INFORMED OF ALL OF HIS RIGHTS. THEREFORE, IN VIEW OF THE RELUCTANCE, DOUBTLESS JUSTIFIABLE, OF COUNSEL FOR APPELLANT TO REPRESENT DURING ARGUMENT THAT GIVEN THE CHANCE, HIS CLIENT WOULD HAVE SUBMITTED AN AFFIDAVIT[2] DENYING THAT HE HAD RECEIVED PROPER NOTIFICATION UNDER THE DETAINER AGREEMENT, WE BELIEVE THAT THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR BY DISMISSING APPELLANT'S COMPLAINT (EXH. A. P. 2).

THE DISTRICT COURT

THIS ACTION WAS COMMENCED BY FILING OF A SWORN COMPLAINT IN THE UNITED STATES DISTRICT COURT (S.D.N.Y.) ON JUNE 4TH 1979 (APP.[3] 3). DEFENDANT MOVED TO DISMISS THE COMPLAINT UNDER FEDERAL RULE 12(b)(6) FOR

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2. THE PLAINTIFF APPELLANT SUBMITTED A SWORN AFFIDAVIT IN THE BODY OF A "PETITION FOR REHEARING" CONCERNING HOW THE "PRISON EMPLOYEES" CREATED A "INSENSITIVE INDIFFERENCE" DENYING THAT PLAINTIFF HAD RECIEVED PROPER NOTIFICATION UNDER THE DETAINER AGREEMENT, THE PETITION FOR REHEARING WAS DENIED NOVEMBER 13, 1980 (EXH. A. P. 9)

3. SINCE PLAINTIFF IS NOT IN POSSESSION OF THE "APPENDIX METHOD" THAT WAS USED AND SUBMITTED TO THE COURT OF APPEALS. "FOR THE CONVENIENCE OF THIS COURT", PLAINTIFF WILL USE THE SAME "CHRONOLOGICAL APPENDIX REFERENCE", THAT WAS PRESENTED TO THE COURT OF APPEALS, THROUGH OUT THIS PETITION FOR WRIT OF CERTIORARI.

FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED. DEFENDANT ASSERTED THAT THEY VIOLATED NO RIGHTS OF THE PLAINTIFF. (APP. 26-27).

IN A MEMORANDUM DECISION DATED NOVEMBER 5, 1979 (APP. 28) (EXH. 2), THE DISTRICT COURT DENIED THE MOTION TO DISMISS AS TO DEFENDANT HARRIS ON THE GROUND THAT THE RECORD WAS "NOT CLEAR AS TO WHETHER PLAINTIFF WAS INFORMED OF HIS RIGHTS TO COUNSEL, TO MAKE A MOTION TO THE GOVERNOR OR TO CONTEST HIS DELIVERY TO THE NEW JERSEY OFFICIALS (APP 31), (EXH. 2., P 4)

ON JANUARY 15, 1980, THE ATTORNEY GENERAL FILED AN AFFIDAVIT ON DEFENDANT'S BEHALF WITH THE DISTRICT COURT (HEREINAFTER, THE 'AFFIDAVIT'). (APP. 34) ATTACHED TO THE AFFIDAVIT WERE TWENTY EXHIBITS PURPORTING TO SHOW THAT THE PROPER PROCEDURES WERE FOLLOWED AND THAT PLAINTIFF'S RIGHTS WERE NOT VIOLATED (APP. 38-94) PLAINTIFF ATTEMPTED TO RESPOND TO THE AFFIDAVIT BY FILING, A MEMORANDUM OF LAW IN OPPOSITION

ON FEBRUARY 21, 1980, THE DISTRICT COURT, PURPORTING TO TREAT THE AFFIDAVIT AS A RENEWED MOTION TO DISMISS, ISSUED A MEMORANDUM ENDORSEMENT AND ORDER DISMISSING THE COMPLAINT (APP. 95) (EXH. 1) THE DISTRICT COURT FOUND, EXPLICITLY IN RELIANCE ON THE AFFIDAVIT AND ACCOMPANYING DOCUMENTATION, THAT PLAINTIFF HAD BEEN PROPERLY INFORMED OF HIS RIGHTS UNDER THE AGREEMENT AND THAT NONE OF PLAINTIFF'S RIGHTS UNDER THE AGREEMENT OR CONSTITUTION WERE VIOLATED. THE COURT DID NOT SPECIFY WHICH PARTICULAR DOCUMENTS SUBMITTED BY THE ATTORNEY GENERAL SUPPORTED ITS CONCLUSION.

STATEMENT OF FACTS

THE FOCUS OF THIS ACTION IS THE FAILURE OF THE DEFENDANT TO ACCORD THE PLAINTIFF ANY PROCEDURAL PROTECTION UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSE[4]. UNDER COLOR OF STATE LAW (ARTICLES I, IV(c) AND IX(2) OF THE INTERSTATE AGREEMENT ON DETAINER ACT, C.P.L. S80.20).

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4. EXHIBITS WHICH ARE CITED HEREIN WITHIN THE BODY OF THIS PETITION FOR A WRIT OF CERTIORARI, ARE "ATTACHED HERETO" THE INSTANT PETITION.

On June 5, 1978, Mr. Payton, then serving a prison term at the Comstock Correctional Facility (New York) received information from the County of Essex, New Jersey Prosecutor, via the Superintendent of Comstock Corr. Fac., informing him of criminal charges supporting a Detainer and requesting temporary custody of Plaintiff for trial on two indictments. Mr. Payton denied the allegations contained in the indictments and requested in a letter to the Superintendent of Comstock that counsel be appointed to represent him (App. 8-9). Plaintiff was thereafter transferred to Green Haven Correctional Facility ("Green Haven"), where he renewed his request for counsel[5] by notarized letter to Defendant Harris, Superintendent of Green Haven (App. 9, 10, 25). On June 20, 1978, Plaintiff moved in Dutchess County Supreme Court (New York) for a hearing to contest his transfer and for appointment of counsel (App. 9, 10, 72).

Mr. Payton received no reply to his requests for counsel, which were again renewed by letter of August 27, 1978 to the Dutchess County Supreme Court (New York), his case was placed on the court calender for August 4, 1978 and then adjourned until September 8, 1978 (App. 10, 72). On August 27, 1978, Plaintiff submitted a sworn letter to the Governor of New Jersey declaring his innocence and protesting the proceedings contemplated against him (App. 9, 66-67). On August 30, 1978, Plaintiff was "unlawfully[6] and forceably" removed from the prison chaplain's office where he had gone to obtain assistance in resisting transfer prior to his hearing scheduled for September 8, 1978 in Dutchess County Supreme Court (New York), and was delivered to New Jersey Authorities by agents of Defendant Harris, despite plaintiff's repeated insistence that he be assisted by counsel and permitted to attend the scheduled hearing (App. 12-14). The New Jersey officials then took custody of Plaintiff and removed him to New Jersey, where he was tried and convicted under three indictments, one of which (No. 3036-77) was not set forth in any of the Detainers.

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5. Under Article IV(a) of the Detainer Agreement (C.R.L. 570-20), "requires the prisoner to be advised in writing of his rights to counsel". See full text (Exh-3).

6. It was Defendant (David R. Harris) telling the Plaintiff on the telephone, at the Green Haven chaplain's office: "that Plaintiff was going to New Jersey, willingly or unwillingly, despite of the hearing that was scheduled by the Supreme Court (New York), in order for Plaintiff to contest the legality of his delivery to New Jersey."

It is uncontested by both parties herein, that Mr. Payton was denied a hearing before being transferred to New Jersey. The record also fails to show that Mr. Payton was ever informed of his rights under the Interstate Agreement on Detainers to be advised of his right to counsel, to contest his transfer and to petition the Governor of New York to refuse New Jersey's request for temporary custody (Defendant's affidavit and attached exhibits are not to the contrary, which was submitted to the Court of Appeals) (Plaintiff are not in possession of these exhibits or affidavits). To the contrary, Plaintiff's repeated requests for counsel were uniformly ignored (App 13).

Reasons For Granting The Writ

I.

Whether Plaintiff state a cause of action from which relief can be granted. When Defendant denied Plaintiff the equal protection of the law and the due process clause (Fourteenth Amendment (4th), Sections one(1) and five(5)); under color of state law (Articles I, IV(a) and IX(a) embodied in the "Interstate Agreement on Detainer Act". C.P.L. Section 580.20).

The Defendant does not contest the fact that Mr. Payton was denied a pre-transfer judicial hearing", as well as the Courts below

". The hearing Defendant alleges to have been scheduled in New York for November 3, 1978 (App 37), two months <u>after</u> Plaintiff had been transferred to New Jersey and indicted, could hardly have vindicated Plaintiff's rights. The Essex County Prosecutor's remarks (App 78) indicate that Mr. Payton's New Jersey counsel but not Mr. Payton himself could have attended the hearing. Moreover, the damage to Plaintiff had already been done, and as was conceded by Plaintiff's New Jersey counsel (App. 75), the transfer being illegal, may not have disturbed the New Jersey Court's jurisdiction, e.g., <u>Frisbie</u> vs <u>Collins</u>, 342 U.S. 519 (1952); <u>Ker</u> vs <u>Illinois</u>, 119 U.S. 436 (1886).

(EXH. A. PP 0-4)(COURT OF APPEALS); (EXH. 1 AN 2. PP.1-4) (DISTRICT COURT). SUCH A HEARING IS REQUIRED UNDER COLOR OF STATE LAW(ARTICLES I, IV(c) AND IX(a) "INTERSTATE AGREEMENT ON DETAINER ACT", C.P.L.580.20) AND BY THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT(SECTIONS ONE(1) AND FIVE(5)).

SINCE THE PLAINTIFF IS NOT IN "ANY OR NO" POSITION TO ENFORCE THE LAW WHICH HE IS ENTITLE TO(AND LIBERTY INTEREST). THE DECISION RENDERED BY THE COURT OF APPEALS(EXPANDING[8] THE ARTICLES CITED HEREIN OF THE INTERSTATE AGREEMENT DETAINER ACT, INSTEAD OF PRESERVING SUCH RIGHTS) IN THIS CASE(EXH. A. PP. 0-4) AFFIRMING, THE "PECULIARITY OF THE DISTRICT COURT RENEWED OPINION" (EMPHASIS ADDED), VIOLATES THE "FUNDAMENTAL MAXIM PRINCIPLES" ANNOUNCED IN THE CASES OF ADICKES VS S.H. KRESS AND CO., 398 U.S. 144, 150 (1970), FLAGG BROTHERS VS BROOKS, 436 U.S. 149, 155(1979) ("THE TWO REQUIREMENTS WHICH STATES A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT"); HOLMES VS GOLDIN, 615 F. 2d. 83, 85 (C.A. 2. 1980), CONLEY VS GIBSON, 355 U.S. 41, 45-46 (1957) ("REQUIREMENTS IN DISMISSING A CIVIL RIGHTS COMPLAINT"); CARTER VS STANTON, 405 U.S. 669, 671 (1972) ("REVERSING A DISTRICT COURT DISMISSAL WHICH HAD NOT EXCLUDED MATTERS OUTSIDE THE

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8. INSTEAD OF THE COURT OF APPEALS, RESOLVING THE ISSUE WHETHER PLAINTIFF WAS DENIED A PRE-TRANSFER HEARI UNDER THE ARTICLES OF THE DETAINER AGREEMENT (EXH-3). THE COURT "EXPANDED" THE ARTICLES OF THE DETAINER AGREEMENT, THEREBY STATING: "GIVEN THE VERDICT IN NEW JERSEY, THE ISSUE WHETHER PLAINTIFF WAS A FUGITIVE FROM THAT STATE; THE REQUIRED PAPERS IN ORDER; WAS HE IN FACT THE PERSON BEING CHARGED, MUST BE DEEMED SUBSTANTIALLY RESOLVED AGAINST APPELLANT" (EXH. A. P. 2).

MOREOVER, PLAINTIFF COULD ALSO FURTHER "EXPAND" THE DETAINER AGREEMENT, FOR EXAMPLE: " HAD HIS RIGHTS WERE PRESERVED IN HAVING HIS PRE-TRANSFER HEARING, HE MAY NOT HAVE BEEN SENT TO THE STATE OF NEW JERSEY UNLAWFULLY, AS WELL AS BEING CONVICTED."

HOWEVER, THE PRE-TRANSFER HEARING IS A PROCEDURAL SAFEGUARD, BEFORE A PERSON IS TO BE TRIED. IF A COURT WOULD JUDGE THE SUBSEQUENT RESULT OF THE CRIMINAL PROCEEDING, INSTEAD OF THE " PRE TRANSFER HEARING PROCEDURES SAFEGUARD" UNDER THE ARTICLES CITED HEREIN OF THE DETAINER AGREEMENT (EXH.3), "A PLAINTIFF WOULD BE LEFT REMEDILESS UNDER THE CIVIL RIGHTS ACT" CF., OWENS VS CITY OF INDEPENDENCE, — U.S. —, 100 S.CT. 1398, 1415-1416 (1980).

A TRANSFER WHICH OCCURS WITHOUT AFFORDING A PRISONER THE PROTECTIVE PROCEDURES IN THE EXTRADITION ACT TENDS TO CREATE DISTRUST AND SUSPICION OF THE ENTIRE CRIMINAL JUSTICE SYSTEM, CF., MCEN VS WILSON, 189 COLO. 85, 89, 536 P. 2d. 1129, 1132 (1975) (EN BANC).

PLEADINGS, THE ORDER BELOW OPAQUE AND UNILLUMINATING AS TO EITHER THE RELEVANT FACTS OR THE LAW WITH RESPECT TO THE MERITS OF APPELLANT'S CLAIM"); HEYMAN VS VS COMMERCE AN INDUSTRY INSURANCE CO., 524 F.2d. 1317, 1319-1320 (C.A.2. 1975), ADICKES VS S.H. KRESS AND CO., SUPRA AT 157 (" A DEFENDANT MOVING FOR SUMMARY JUDGMENT HAS THE BURDEN OF SHOWING THE ABSENCE OF A GENUINE ISSUE AS TO ANY MATERIAL FACT, MUST BE VIEW IN THE LIGHT MOST FAVORABLE TO THE OPPOSING PARTY"); WEISMAN VS LELANDAIS, 532 F.2d. 308, 309 N.3 (C.A.2. 1976), DALE VS HAHN, 440 F.2d. 633, 638 (C.A.2. 1971) (RULE 12(B)(6) TO BE TREATED AS ONE FOR SUMMARY JUDGMENT IF THE COURT DID NOT EXCLUDE MATERIALS OUTSIDE THE PLEADINGS, ALSO PROVIDES THAT ALL PARTIES SHALL BE GIVEN REASONABLE OPPURTUNITY TO PRESENT ALL MATERIAL MADE PERTINENT TO SUCH A MOTION BY RULE 56"), WHICH NEED NOT TO BE EXPLAIN HERE.

ACCORDINGLY, THE DECISIONS RENDERED IN BOTH COURTS BELOW SHOULD BE REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER SUMMARY JUDGMENT FOR THE PLAINTIFF, AS WELL AS THE BELOW (INFRA) STATED REASONS.

THE COURT OF APPEALS FOR THE THIRD CIRCUIT RECENTLY RULED, THE INTERSTATE AGREEMENT ON DETAINER RESERVES THE PRISONERS THE RIGHTS GRANTED UNDER THE UNIFORM CRIMINAL ACT (THE "EXTRADITION ACT"), INCLUDING THE RIGHT TO A PRE-TRANSFER HEARING, CF., ADAMS VS CUYLER, 592 F.2d. 720 (C.A.3. 1979), CERT. GRANTED 100 S.CT. 1011 (1980) (ARGUED OCTOBER 7, 1980).

THE GREAT WEIGHT OF CASE AUTHORITIES HOLDS THAT VIOLATIONS OF STATE LAWS RELATING TO EXTRADITION, INCLUDING THE AGREEMENT AND EXTRADITION ACT, GIVE RISE TO AN ACTION FOR DAMAGES UNDER THE FEDERAL CIVIL RIGHTS LAWS, CF., BROWN VS NUTSCH, 619 F.2d. 758, 764 (C.A.8. 1980); CRUMLEY VS SNEAD 620 F.2d. 481, 483 (C.A.5. 1980); MCBRIDE VS SOOS, 594 F.2d. 610, 613 (C.A.7. 1979); ADAMS VS CULYLER, SUPRA AT 720; WIRTH VS SURLES, 562 F.2d. 319 (C.A.4. 1977), CERT DENIED 435 U.S. 933 (1978); SANDERS VS CONINE, 506 F.2d. 530, 532 (C.A.10. 1974); PIERSON VS GRANT, 357 F. SUPP. 397, 399 (N.D. IOWA 1973), AFF'D ON OTHER GROUNDS, 527 F.2d. 161 (C.A.8. 1975); BRZOZOWSKI VS RANDALL, 281 F. SUPP. 306, 311 (E.D. PA. 1968); CONTRA, RAFFONE VS SULLIVAN, 436 F. SUPP. 939 (D. CONN. 1977), REMANDED WITHOUT OPINION, 595 F.2d. 1209 (C.A.2. 1979); HINES VS GUTHREY, 342 F. SUPP. 594 (W.D. VA. 1972); JOHNSON VS BUIE, 312 F. SUPP. 1349 (W.D. MO. 1970).

THE COUNCIL OF THE STATE GOVERMENTS, WHICH APPROVED THE AGREEMENT AT ITS 1956 CONFERENCE, EXPLAINED ARTICLE IV(d) AS FOLLOWS:

ARTICLE IV(b) SAFEGUARDS CERTAIN OF THE PRISONER'S RIGHTS. NORMALLY, THE ONLY WAY TO GET A PRISONER FROM ONE JURISDICTION TO ANOTHER PURPOSES OF TRIAL ON AN INDICTMENT, INFORMATION OR COMPLAINT IS THROUGH RESORT TO EXTRADITION OR WAIVER THEREOF. IF THE PRISONER WAIVES, THERE IS NO PROBLEM. HOWEVER, IF HE DOES NOT WAIVE EXTRADITION, IT IS NOT APPROPRIATE TO ATTEMPT TO FORCE HIM TO GIVE UP THE SAFEGUARDS OF THE EXTRADITION PROCESS, EVEN IF THIS COULD BE DONE CONSTITUTIONALLY. NEVERTHELESS THE RIGHT TO INSIST ON ACTION BY THE GOVERNOR IS A RIGHT OF THE STATE AND NOT OF THE PRISONER. CONSEQUENTLY, IT IS PROVIDED THAT THE PRISONER SHALL NOT BE ABLE TO PLEAD GUBERNATORIAL INACTIVITY IN RESISTING DELIVERY TO THE OTHER STATE. THE SITUATION CONTEMPLATED BY THIS PORTION OF THE AGREEMENT IS DIFFERENT THAN THAT DEALT WITH IN ARTICLE III. THAT ARTICLE RELATES TO PROCEEDINGS INITIATED AT THE REQUEST OF THE PRISONER. ACCORDINGLY, IN SUCH INSTANCES IT IS FITTING THAT THE PRISONER BE REQUIRED TO WAIVE EXTRADITION. IN ARTICLE IV THE PROSECUTION INITIATES THE PROCEEDING. CONSEQUENTLY, IT PROBABLY WOULD BE IMPROPER TO REQUIRE THE PRISONER TO WAIVE THOSE FEATURES OF THE EXTRADITION PROCESS WHICH ARE DESIGNED FOR THE PROTECTION OF HIS RIGHTS.

COUNCIL OF STATE GOVERMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR 1957, 78-79 (1956) (EMPHASIS ADDED). THE COUNCIL'S EXPLANATION MAKE IT CLEAR THAT THE EXISTING RIGHTS OF THE PRISONER UNDER THE EXTRADITION PROCESS ARE WAIVED ONLY WHEN PROCEEDINGS ARE INITIATED AT HIS REQUEST, EXCEPT TO THE EXTENT THAT THE GOVERNOR'S CONSENT TO TRANSFER IS NO LONGER REQUIRED.

THE RIGHT TO A HEARING IS A HALLOWED TENET OF AMERICAN CONSTITUTIONAL LAW. AS JUSTICE FRANKFURTER EMPHASIZED:

"

NO BETTER INSTRUMENT HAS BEEN DEVISED FOR ARRIVING AT TRUTH THAN TO GIVE A PERSON IN JEOPARDY OF SERIOUS LOSS NOTICE OF THE CASE AGAINST HIM AND AN OPPORTUNITY TO MEET IT. NOR HAS A BETTER WAY BEEN FOUND FOR GENERATING THE FEELING, SO IMPORTANT TO A POPULAR GOVERMENT, THAT JUSTICE HAS BEEN DONE. CF., JOINT ANTI-FASCIST

COMMITTEE Vs McGRATH, 341 U.S. 123, 171-172 (1951)

IN VIEWING THE PLAINTIFF'S CONTENTIONS IN THE BODY OF THIS PETITION, IT CAN BE SAID AS IT WAS STATED BY THE MR. JUSTICES IN THE CASE OF FURMAN Vs GEORGIA, 408 U.S. 238, 242 (1972):

"WHAT MAY BE DONE WITH THE LAW IN ITS APPLICATION DO, OR MAY LEAD TO QUITE DIFFERENT CONCLUSION".

A

UNDER THE AUTHORITY OF WOOD Vs STRICKLAND, 420 U.S. 308, 326-327 (1975), THE INSTANT CASE SHOULD BE BE REMANDED TO THE COURTS BELOW, TO DISCUSS WHETHER THERE WAS A PROCEDURAL DUE PROCESS VIOLATION UNDER THE ARTICLES OF THE DETAINER AGREEMENT, RATHER THAN THE SUPREME COURT.

FIRST, THE COURT OF APPEALS AND DISTRICT COURT, DID NOT ADRESSED THE ISSUE, WHETHER THERE WAS A PROCEDURAL DUE PROCESS VIOLATION UNDER THE ARTICLES CITED HEREIN (EXH. 3) THE DETAINER AGREEMENT, IN THE UNLAWFULLY REMOVING PLAINTIFF FROM NEW YORK, SENT TO NEW JERSEY (WHEN A PRE TRANSFER HEARING SCHEDULE BY THE NEW YORK COURT). HOWEVER, THE COURT OF APPEALS, DID EXPAND THE ARTICLES HEREIN OF THE DETAINER ACT, SEE: SUPRA AT PAGE 9.

SECONDLY, THE DISTRICT COURT DETERMINED IN ITS MEMORANDUM DECISION (NOVEMBER 5, 1979) (APP. 28) (EXH. 2), DENIED DEFENDANT (DAVID HARRIS) MOTION TO DISMISS ON THE GROUND THAT THE RECORD WAS NOT CLEAR AS TO WHETHER PLAINTIFF WAS INFORMED OF HIS RIGHTS TO COUNSEL, TO MAKE A MOTION TO THE GOVERNOR OR TO CONTEST HIS DELIVERY TO THE NEW JERSEY OFFICIALS (APP. 31) (EXH. 2. P. 4).

THEREAFTER, ATTORNEY FOR DEFENDANT FILE AFFIDAVITS[9] ON BEHALF

9. SOME OF THE DEFENDANT'S AFFIDAVIT WHICH WAS PRESENTED TO PLAINTIFF, SUBSTANTIATE HIS CAUSE OF ACTION. SEE: DISCUSSION AT PAGES 15-17, INFRA.

OF DEFENDANT (DAVID R. HARRIS), ATTACHED TO THE AFFIDAVIT WERE TWENTY EXHIBITS PURPORTING TO SHOW THAT THE PROPER PROCEDURES WERE FOLLOWED AND THAT THE PLAINTIFF'S RIGHTS WERE NOT VIOLATED (APP. 38-94) PLAINTIFF ATTEMPTED TO RESPOND TO THE AFFIDAVIT BY FILING A MEMORANDUM OF LAW.

ON FEBRUARY 21, 1980, THE DISTRICT COURT, PURPORTING TO TREAT THE AFFIDAVIT AS A RENEWED MOTION TO DISMISS, ISSUED A MEMORANDUM ENDORSEMENT AND ORDER DISMISSING THE COMPLAINT (APP. 95) (EXH. 1) THE DISTRICT COURT FOUND, EXPLICITLY IN RELIANCE ON THE AFFIDAVIT AND ACCOMPANYING DOCUMENTATION, THAT PLAINTIFF HAD BEEN PROPERLY INFORMED OF HIS RIGHTS UNDER THE AGREEMENT AND THAT NONE OF THE PLAINTIFF'S RIGHTS UNDER THE AGREEMENT OR CONSTITUTION WERE VIOLATED. THE COURT DID NOT SPECIFY WHICH PARTICULAR DOCUMENTS SUBMITTED BY THE ATTORNEY GENERAL SUPPORTED ITS CONCLUSION.

THE COURT OF APPEALS, IMPLIED, ALTHOUGH THESE DOCUMENTS BY THEMSELVES "MIGHT NOT HAVE BEEN SUFFICIENT TO SUSTAIN THE GOVERMENT'S MOTION", THE ADDITIONAL EVIDENCE IN THE RECORD OF APPELLANT'S FAMILIARITY WITH THE PROCEDURES OF THE AGREEMENT, INCLUDING HIS REPEATED REQUESTS FOR COUNSEL[10] AND HIS... LETTER TO THE GOVERNOR OF NEW JERSEY, PROVIDE PERSUASIVE EVIDENCE THAT APPELLANT WAS IN FACT INFORMED OF ALL OF HIS RIGHTS. THEREFORE, IN VIEW OF THE RELUCTANCE, DOUBTLESS JUSTIFIABLE, OF COUNSEL FOR APPELLANT TO REPRESENT DURING ARGUMENT THAT GIVEN THE CHANCE, HIS CLIENT WOULD HAVE SUBMITTED AN AFFIDAVIT DENYING THAT HE HAD RECEIVED PROPER NOTIFICATION UNDER THE DETAINER AGREEMENT, WE BELIEVE THAT THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR BY DISMISSING APPELLANT'S COMPLAINT (EXH. A - P. 2).

THE PLAINTIFF APPELLANT SUBMITTED A SWORN

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10. TAKEN THE COURT OF APPEALS ASSERTIONS AS TRUE, THAT: "APPELLANT'S FAMILIARITY WITH THE PROCEDURES OF THE DETAINER AGREEMENT, INCLUDING HIS REQUEST FOR COUNSEL (EVEN THOUGH COUNSEL WAS NOT APPOINTED), AS WELL AS PLAINTIFF BEING DENIED HIS PRE TRANSFER HEARING, CAN ONLY SUBSTANIATE THE PLAINTIFF'S CLAIM, THAT HE WAS IN FACT DENIED THE EQUAL PROTECTION UNDER THE ARTICLES HEREIN OF THE DETAINER AGREEMENT" (EXH. 3).

WITHAL, ON THE OTHER HAND, THE PRO SE PLAINTIFF COULD HAVE NOT BEEN FAMILAR WITH THE PROCEDURES OF THE DETAINER AGREEMENT IN WRITING A NOTARIZED LETTER TO THE GOVERNOR IN NEW JERSEY, RATHER THE GOVERNOR OF NEW YORK (UNLESS IN FACT HE WAS NOT PROPERLY ADVISED UNDER THE DETAINER ACT). HOWEVER, UNDER ARTICLE III (a), THE RIGHT IS OF THE PRISONER, NOT THE GOVERNOR.

AFFIDAVIT IN THE BODY OF A "PETITION FOR REHEARING", CONCERNING HOW THE "PRISON EMPLOYEES" CREATED A "INSENSITIVE INDIFFERENCE", IN DENYING THAT PLAINTIFF HAD RECIEVED ADEQUATE PROPER NOTIFICATION UNDER THE DETAINER AGREEMENT. THE PETITION FOR REHEARING WAS DENIED, NOVEMBER 13, 1980 (EXH. A-P. O).

ACCORDINGLY, THE ISSUES IN THE INSTANT CASE SHOULD BE REMANDED TO THE COURTS IN BELOW, UNDER THE AUTHORITY OF WOOD VS STRICKLAND SUPRA AT 327, FOR THE COURTS IN BELOW TO DISCUSS, WHETHER THERE WAS A PROCEDURAL DUE PROCESS VIOLATIONS UNDER COLOR OF STATE LAW (ARTICLES OF DETAINER AGREEMENT ACT HEREIN. SEE: EXH. 3), IN NOT AFFORDING PLAINTIFF A HEARING; THE RECORD IS NOT CLEAR AS TO WHETHER PLAINTIFF WAS INFORMED OF HIS RIGHT TO COUNSEL; TO MAKE A MOTION TO THE GOVERNOR; TO CONTEST HIS DELIVERY TO THE NEW JERSEY OFFICIALS, RATHER THAN THE SUPREME COURT DISCUSSING THE ABOVE SAID ISSUES. ALSO SEE: CARTER VS STANTON, SUPRA.

B

WHERE FEDERAL RIGHTS HAVE BEEN INVADED THE COURTS WILL BE ALERT TO ADJUST THEIR REMEDIES, ETC.

WHERE FEDERAL RIGHTS HAVE BEEN INVADED IT HAS BEEN THE RULE FROM THE BEGINNING THAT COURTS WILL BE ALERT TO ADJUST THEIR REMEDIES AS TO GRANT THE NECESSARY RELIEF, E.g., BELL VS HOOD, 327 U.S. 678 (1948). CF., OWEN VS CITY OF INDEPENDENCE, SUPRA AT 1416; BUTZ VS ECONOMOU, 98 S.CT. 2894 (1978); DAVIS VS PASSMAN, 99 S.CT. 2264, (1979); BIVENS VS SIX UNKNOWN AGENTS, 403 U.S. 388 (1971); TURPIN VS MAILET, 579 F.2d. 152, 157 (C.A.2. 1978) (... BIVENS ESTABLISHED THAT DAMAGES COULD FLOW FROM INJURIES BY INVASION OF OTHER CONSTITUTIONAL PROVISIONS); CAREY VS PIPHUS, 98 S.CT. 1042 (DENIAL OF "PROCEDURAL DUE PROCESS" SHOULD BE ACTIONABLE FOR NOMINAL DAMAGES WITHOUT PROOF OF ACTUAL INJURY).

THE CIVIL RIGHTS ACT IS REMEDIAL, AND IN THE AID OF

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11. SOME OF THE DEFENDANTS EXHIBITS WHICH WERE SUBMITTED TO THE DISTRICT, WAS NEVER PRESENTED TO THE PLAINTIFF. IT ONLY SHOWS HOW PRISON EMPLOYEES CREATES INDIFFERENCES TO PRISONERS NEEDS. "AN INMATE MUST RELY ON PRISON AUTHORITIES TO TREAT HIS NEEDS; IF [THOSE] AUTHORITIES FAIL TO DO SO, THOSE NEEDS WILL NOT BE MET." CF., ESTELLE VS GAMBLE, 429 U.S. 97, 103 (1976).

OF THE PRESERVATION OF HUMAN RIGHTS AND HUMAN LIBERTY, C.F., OWEN VS. CITY OF INDEPENDENCE, SUPRA AT 1408.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DECLARES "NO STATE SHALL . . . DENY TO ANY PERSON WITHIN ITS JURISDICTION, THE EQUAL PROTECTION OF THE LAW"; THE LAW IS CLEAR THAT THE OFFICIAL ACTIONS AT ANY HIERARCHIAL LEVEL, WHICH DENIES THE PLAINTIFF EQUAL PROTECTION OF THE LAW IS UNCONSTITUTIONAL, CF., EX PARTE VIRGINIA, 100 U.S. 339-347 (1880); DAVIS VS PASSMAN, SUPRA; BUTZ VS ECONOMOU, SUPRA. SEE ALSO: MORRISEY VS BREWER, 408 U.S. 471, 481 (1972); WOLFF VS MCDONNELL, 418 U.S. 539, 555-556 (1974).

II

WHETHER THE HEARSAY EVIDENCE SUBMITTED BY DEFENDANT IN SUPPORT OF THEIR MOTION TO DISMISS ESTABLISHES THE ABSENCE OF A MATERIAL ISSUE OF FACT OR EVEN CONTAINS PROBATIVE MATERIAL CONTRADICTING PLAINTIFF'S CLAIM.

THE PLAINTIFF'S ARGUMENT CONCERNING THE DEFENDANT EXHIBITS AND THE COURTS OPINION IN BELOW CONCERNING DEFENDANT EXHIBITS, HAS ALREADY BEEN SPECIFICALLY STATED, PAGES 12-14 SUPRA. PLEASE TAKE PARTICULAR ATTENTION TO FOOTNOTE 11, SUPRA AT 14 (EMPHASIS ADDED)

HOWEVER, THE AFFIDAVITS AND ACCOMPANYING DOCUMENTS FOR DEFENDANTS (SUBMITTED IN THE COURTS BELOW[12]) DO NOTHING TO CONTRADICT PLAINTIFF'S ALLEGATIONS UNDER ARTICLE IX (A) (APPOINTMENT OF COUNSEL, ETC). ONLY TWO OF THE EXHIBITS ATTACHED TO THE AFFIDAVIT EVEN REMOTELY PERTAIN TO THIS ISSUE. EXHIBIT "B" (APP. 41), ENTITLED "AGREEMENT ON DETAINERS FORM I", IS A NOTICE OF UNTRIED INDICTMENT AND OF RIGHT TO REQUEST DISPOSITION" DATED APRIL 6, 1978.

THE NOTICE, ISSUED BY THE SUPERINTENDENT OF THE CLINTON CORRECTIONAL FACILITY, DESCRIBES AN UNTRIED INDICTMENT AGAINST MR. PAYTON

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12. DEFENDANT EXHIBITS ARE NOT, IN THE PLAINTIFF POSSESSION AT THIS TIME, PLAINTIFF'S COURT APPOINTED ATTORNEY HAS POSSESSION OF THE RECORD SUBMITTED TO THE COURT OF APPEALS.

AND ADVISES THAT IN THE EVENT PROCEEDINGS WERE TO BE INSTITUTED AGAINST MR. PAYTON, HE COULD OPPOSE THE REQUEST FOR CUSTODY AND REQUEST THAT THE GOVERNOR OPPOSE SUCH REQUEST. AT THE BOTTOM OF THE NOTICE UNDER A LINE SUPPLIED FOR THE INMATE SIGNATURE, THERE IS WRITING INDICATING THAT SOMEONE "REFUSED TO SIGN APRIL 10, 1976". THERE IS NO EVIDENCE OF WHO REFUSED TO SIGN AND NO EVIDENCE THAT THIS DOCUMENT WAS EVER BROUGHT TO MR. PAYTON'S ATTENTION. THE DOCUMENT IS WOEFULLY DEFICIENT, IF OFFERED TO PROVE THAT MR. PAYTON RECEIVED THE REQUISITE NOTICE UNDER ARTICLE IX(a). IT IS IN VIOLATION OF FEDERAL RULE CIVIL PROCEDURE, RULE 56(e), WHICH REQUIRES THAT AFFIDAVITS "SHALL BE MADE ON PERSONAL KNOWLEDGE [AND] SHALL SET FORTH SUCH FACTS AS WOULD BE ADMISSIBLE IN EVIDENCE...". FIRST, ASSUMING THAT MR. PAYTON INDEED REFUSED TO SIGN THE DOCUMENT, THERE IS NO EVIDENCE THAT HE READ IT OR UNDERSTOOD IT. (THE REQUISITE NOTICE IS CAMOUFLAGED AT THE BOTTOM OF A PROLIX, SINGLE-SPACED PARTIALLY ILLEGIBLE LEGAL FORM.) THE DOCUMENT IS SIMPLY NOT PROBATIVE ON THE ISSUE OF NOTICE OF ARTICLE IX(a) RIGHTS. SECOND, THE DOCUMENT IS INCOMPETENT TO SHOW THAT MR. PAYTON REFUSED TO SIGN IT. THE ANONYMOUS SCRAWLED NOTATION THAT PLAINTIFF REFUSED TO SIGN THE DOCUMENT IS HEARSAY EVEN AS TO THE ISSUE OF WHETHER HE REFUSED TO SIGN IT.

SIMILARLY, EXHIBIT "H" (APP. 55-56), "AGREEMENT ON DETAINERS: FORM IV" IS AN 'OFFER TO DELIVER TEMPORARY CUSTODY', SIGNED BY THE ACTING SUPERINTENDENT AT GREENHAVEN AND ADDRESSED TO THE CHIEF OF DETECTIVES IN ESSEX COUNTY, NEW JERSEY. AT THE BOTTOM OF THE FORM, LINE B, IS A SPACE FOR THE INMATE (PRISONER) TO REQUEST "THE COURT" TO APPOINT COUNSEL[13]. THERE IS A NOTATION THAT MR. PAYTON REFUSED TO SIGN. APART FROM THE HEARSAY PROBLEMS ATTENDANT TO EXHIBIT "B" AND THE LACK OF PROOF THAT MR. PAYTON EVER SEEN THIS DOCUMENT, IT IS NOT CLEAR FOR WHAT PURPOSE THE FORM OFFICERS THE PRISONER AN OPPORTUNITY TO REQUEST COUNSEL - IT IS AMBIGUOUS WHAT "COURT" IS MEANT. THE DOCUMENT COULD BE READ AS ALLOWING A REQUEST FOR COUNSEL TO REPRESENT THE INMATE AT HIS TRIAL IN THE DEMANDING STATE (NEW JERSEY). THIS CRYPTIC SPACE ON A FORM WHICH IS NOT EVEN ADDRESSED TO MR. PAYTON CANNOT BE CONSTRUED AS

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13. IT CAN ALSO BE NOTED, THAT PLAINTIFF HIMSELF, SUBMITTED A MOTION TO THE COURT, THAT HE DRAFTED, FOR THE APPOINTMENT OF COUNSEL (NOT KNOWING THEIR WAS A RIGHT UNDER ARTICLE IX(a). THIS IS ONE OF THE REASONS WHY, WHEN PLAINTIFF INIATED THE SUIT IN THE DISTRICT COURT, HE SUED FOR HIS SIXTH AMENDMENT RIGHT, FOR NOT HAVING COUNSEL APPOINTED TO THIS PROCEEDING, WHEN REQUESTING IT FROM THE PRISON EMPLOYERS.

ADEQUATELY NOTIFYING HIM OF HIS RIGHT TO REQUEST COUNSEL TO OPPOSE HIS DELIVERY TO NEW JERSEY.

IN THE ABOVE MENTION ARGUMENT, PERTAINING TO DEFENDANT'S EXHIBITS. PLAINTIFF CONTENDS THAT NOTHING OF THE DEFENDANT'S EXHIBITS DO NOT EVEN CONTRADICTS THE ARTICLE IV (d) CLAIM. SINCE THERE IS NO MATERIAL ISSUE AS TO THE FACT THAT PLAINTIFF DID NOT RECEIVE THE REQUIRED NOTICE, IT IS APPROPRIATE THAT SUMMARY JUDGMENT BE ENTERED IN PLAINTIFF'S FAVOR.

THEREFORE, THE DECISIONS IN THE COURTS BELOW SHOULD BE REVERSED AND REMANDED UNDER THE AUTHORITIES OF CARTER VS STANTON, SUPRA; HEYMAN VS COMMERCE AN INDUSTRY INSURANCE CO, ADICKES VS S.H. KRESS AN CO; WEISMAN VS LELANDAIS, DALE VS HAHN, SUPRA; WOOD VS STRICKLAND, SUPRA.

THE COURTS HAS HELD IN PRISONERS CIVIL RIGHTS CASES OF HUDSON VS HARDY, 412 F. 2d. 1091, 1094 (D.C. CIR. 1968) ("REQUIRENENTS OF THE SUMMARY JUDGMENT RULE MAY NOT FAIRLY BE APPLIED "WITH STRICT LITERALNESS" TO A PRISONER UNREPRESENTED BY COUNSEL AND SUBJECT TO THE HANDICAPS... DETENTION NECESSARILY IMPOSES UPON A LITIGANT"); JENSEN VS KLECKER, 599 F. 2d. 243, 245 (C.A. 8, 1979) ("RELIANCE BY DISTRICT COURT UPON AN AFFIDAVIT OUTSIDE PLEADINGS (AGAINST PRISONERS) WITHOUT TREATING DEFENDANTS MOTION TO DISMISS CIVIL RIGHTS COMPLAINT AS A MOTION FOR SUMMARY JUDGMENT AND WITHOUT GIVING PLAINTIFFS NOTICE OF ITS INTENT TO DO SO WAS PREJUDICIAL"). ALSO SEE: MCLAIN VS MEIER, 612 F. 2d. 349, 356 (C.A. 8. 1999) (" JUDGMENT AGAINST PRO SE LITIGANT ON A RULE 56 MOTION, PERFORMS WHAT AMOUNTS TO WHAT MAY BE CALLED A NEGATIVE DISCRETIONARY FUNCTION").

A

THE DECISION OF ADAMS VS CUYLER, SUPRA, RAISES ONE OF THE PLAINTIFF'S SIMILAR CONTENTION (ARTICLE IV (d) OF THE DETAINER AGREEMENT), JUST WAS ARGUED IN THIS COURT ON OCTOBER 7, 1980., NO DISPOSITION HAS NOT BEEN RENDERED BY THIS COURT.

SINCE THE DECISION OF THE CASE OF ADAM VS CUYLER SUPRA, RAISES ONE OF THE PLAINTIFF'S SIMILAR CONTENTION UNDER ARTICLE IV (d)., NO DISPOSITION HAS BEEN RENDERED BY THIS COURT (ARGUED OCTOBER 7, 1980).

It would therefore, seem appropriate to withold action on the instant petition until the pending case (Adams Vs Coyler, Supra) have been resolved by this court and to assess the appropriateness of reviewing of the decision in the Adams case.

Conclusion

For the above said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the second circuit, "affirming the renewed opinion", rendered by the United States District Court for the Southern District of New York.

Respectfully Submitted

Pro Se: Richard Payton 78-A-0098
Drawer B
Stormville, New York, 12582

I also understand that a false statement in this petition will subject me to the penalties for perjury.

Sworn To Before Me This
5th Day of January 1981
Esmond W. Gifford Sr

ESMOND W. GIFFORD, SR.
Notary Public, State of New York
Dutchess County
My Commission Expires March 30, 1981

EXHIBITS

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of November , one thousand nine hundred and eighty.

Present:

HON. WILFRED FEINBERG,
Chief Judge,
HON. ELLSWORTH A. VanGRAAFEILAND,
Circuit Judges,

HON. JAMES S. HOLDEN,
~~Circuit Judges.~~
District Judge.

80-2086

Docket No. 80-2086

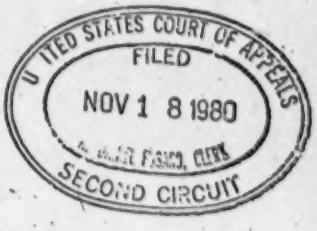
RICHARD PAYTON,

Petitioner-Appellant,

v.

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.



A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

EXHIBIT A

A. Daniel Fusaro

A. DANIEL FUSARO
Clerk

by Rolanne Henry
Deputy Clerk

N.P. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Court of Appeals

CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October , one thousand nine hundred and eighty.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE ELLSWORTH A. VAN GRAAFEILAND
Circuit Judge

HONORABLE JAMES S. HOLDEN*/
District Judge

80-2086

RICHARD PAYTON,

Plaintiff-Appellant,

- against -

80-2086

DAVID HARRIS,

Defendant-Respondent.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, J., dismissing appellant's complaint against David Harris, the former warden of Greenhaven Correctional Facility in New York (Greenhaven). Appellant's action, brought pursuant to 42 U.S..C. § 1983, sought injunctive and declaratory relief and damages arising from his allegedly wrongful transfer without a hearing under the Interstate Agreement on Detainers (Detainer Agreement), N.Y. Crim. Proc. Law § 580.20 (McKinney 1971), from Greenhaven to New Jersey for trial there on criminal charges. On appeal, appellant challenges the absence of a pre-transfer hearing on both statutory and constitutional grounds and argues that Judge Werker erred in his memorandum opinions dated November 5, 1979 and February 21, 1980 in granting judgment to defendant while there were still material issues of fact in dispute.

EXHIBIT A

*/ United States District Judge for the District of Vermont, sitting by designation.

Appellant is presently serving a sentence of 20 years to life in Greenhaven for murder. After appellant was transferred to New Jersey in August 1978, he was convicted in the courts of that state of murder, assault and other related crimes, convictions he expressly does not challenge before us. Appellant concedes that the only issues which would have been open in the pre-transfer hearing he was allegedly wrongfully denied under the Detainer Agreement were whether he had been substantially charged with a crime in the demanding state (New Jersey), whether he was a fugitive from that state, whether he was present in the demanding state at the time that the crime was committed, and whether the required papers were in order and he was in fact the person being charged. See Michigan v. Doran, 439 U.S. 282, 289 (1978). Given the verdict in New Jersey, however, all of these issues must be deemed substantially resolved against appellant, indicating that even if he had been afforded a pre-transfer hearing it would not have affected his current status, a conclusion reinforced by the failure of appellant's counsel to take advantage of the hearing in New York on November 3, 1978. Notwithstanding appellant's excellent brief and argument on the issue whether a pre-transfer hearing was necessary, we therefore decline to pass on the merits of appellant's challenge to appellee's construction of the Detainer Agreement. We note that the issue is presently sub judice in the United States Supreme Court in Adams v. Cuyler, 592 F.2d 720 (3d Cir. 1979), cert. granted, 100 S.Ct. 1011 (1980) (argued October 7, 1980).

Appellant also claims that the notice provisions of the Detainer Agreement were violated and that the district court erred in dismissing his complaint on the basis of exhibits offered by appellee, which indicated on their face that appellant "refused to sign" the written notices of his rights under the Agreement. Although these documents by themselves might not have been sufficient to sustain the government's motion, the additional evidence in the record of appellant's familiarity with the procedures of the Agreement, including his repeated requests for counsel and his August 27, 1978 letter to the governor of New Jersey, provide persuasive evidence that appellant was in fact informed of all of his rights. Therefore, in view of the reluctance, doubtless justifiable, of counsel for appellant to represent during argument that given the chance, his client would have submitted an affidvit denying that he had received proper notification under the Detainer Agreement, we believe that the district court committed no reversible error by dismissing appellant's complaint.

Accordingly, the judgment below is affirmed.

EXHIBIT A

WILFRED FEINBERG,
Chief Judge

ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge

JAMES S. HOLDEN,
District Judge

EXHIBIT A

EXHIBIT 1.

U.S. DISTRICT COURT
FILED
FEB 23 1980
S.D. OF N.Y.

MEMORANDUM ENDORSEMENT

79 Civ. 2879 (HFW)

The within affidavit, having been submitted by the Attorney General and responded to by pro se plaintiff Richard Payton is hereby construed as a renewed motion to dismiss.

In light of the additional documentation provided by defendant in response to this court's memorandum decision and order dated November 5, 1979, the court is now convinced that plaintiff was properly informed of his rights under the Interstate Agreement on Detainers, N.Y. Crim. Proc. Law § 580.20 (McKinney 1971).

Accordingly, since none of plaintiff's rights under the Agreement or the Constitution were violated, the complaint is dismissed against the remaining defendant Harris.

SO ORDERED.

Dated: New York, New York
February 21, 1980

Henry F. Werker
U.S.D.J.

FEB 28 1980

79 Civ. 2879 H.F.W

UNITED STATES DIST
SOUTHERN DISTRICT
NEW YORK

RICHARD PAYTON,

Plaint

-against-

DAVID HARRIS, Supe
Green Haven Correc
Facility,

Defend

AFFIDAV

ROBERT ABI

Attorney for.....Defendar

Office And Post Off
Two World Trade Center, Ne
Tel. (212) 488-27

Person

within.....

is admitted this.....

.....

Please take notice that the within is a true
filed and entered in the office of the Clerk
County, on
day of , 19

Yours, etc.,
ROBERT ABRAMS,
Attorney General,

Office And Post Office Address
Two World Trade Center, New York, N.Y. 10047
Esq.

notice that the within

for settlement and signature herein
ges of the within named Court, at
of
day of
19 , at M.

Dated, N.Y., 19

Yours, etc.
ROBERT ABRAMS,
Attorney General,

Office And Post Office Address
Two World Trade Center, New York, N.Y. 10047
Esq.

(8)

USDC

COPY

Kelly Field 11/13/79

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD PAYTON,

Plaintiff,

- against -

HUGH CAREY, GOVERNOR STATE OF NEW YORK, et al.,

Defendants.

MEMORANDUM DECISION

79 Civ. 2879 (HFW)
Dated: November 5, 1979
NP #650

HENRY F. WERKER, D. J.

Pro se plaintiff Richard Payton, a prisoner in the Green Haven Correctional Facility, brought a civil action seeking injunctive and declaratory relief as well as compensatory and punitive damages under 42 U.S.C. § 1983 claiming that defendants Carey, Lefkowitz, Hongisto and Harris[1] had acted to deprive him of rights secured under the provisions of the Interstate Agreement on Detainers ("Detainer Agreement")[2] and several constitutional amendments.[3] Defendants moved to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the complaint failed to state a claim upon which relief could be granted since the defendants had not violated any of plaintiff's rights.

For the purposes of this motion, we must only decide whether the claimant is entitled to offer evidence to support his claims, not whether he will ultimately prevail. In passing on a motion to dismiss for failure to state a cause of action, the allegations of the complaint must be construed in favor of the pleader unless it appears beyond doubt that he is unable to prove any set of facts in support of his claim which would entitle him to relief. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), citing Conley v. Gibson, 355 U.S. 41 (1957); George C. Frey Ready Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977).

EXHIBIT 2.

Furthermore, allegations of a pro se complaint are held to less stringent standards than pleadings drafted by a lawyer. Haines v. Kerner, 404 U.S. 519 (1972). An examination of plaintiff's complaint herein raises questions which require further analysis and therefore it should not be dismissed at this stage of litigation.

Plaintiff is under the custody of the New York State Department of correction after conviction in New York State Supreme Court on November 14, 1977 and sentencing on December 14, 1977 to a term of twenty years to life imprisonment. Plaintiff states that on June 5, 1978 he received information from the State of New Jersey, County of Essex Prosecutor, via the Superintendent of the Comstock Correctional Facility, informing plaintiff of criminal charges lodged as a detainer and requesting temporary custody. Plaintiff allegedly made repeated requests for the assignment of an attorney and a hearing in the Supreme Court of the State of New York (Dutchess County) in order to contest the accusations submitted by the State of New Jersey seeking temporary custody. These requests were allegedly made both before and after plaintiff's transfer from Comstock to the Green Haven Correctional Facility. A second request for temporary custody dated August 14, 1978 was presented to defendant Harris, Superintendent of Green Haven. On August 30, 1978, New Jersey officials came to the Green Haven Correctional Facility and took temporary custody of plaintiff and removed him to New Jersey. On September 1, 1978, plaintiff appeared before the Superior Court of Essex County, New Jersey, without an attorney and entered a plea of "not guilty" on all indictments.

EXHIBIT 2

Plaintiff alleges that his rights enumerated by the Detainer Agreement and his constitutional rights were violated by defendants in that he was not permitted a hearing and appointed counsel prior to his transfer to New Jersey. Defendants argue that plaintiff was neither constitutionally nor statutorily entitled

to a hearing or appointment of counsel prior to his removal to New Jersey.

The Detainer Agreement was enacted by the party states "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints."[4] Article IV(a) of the Detainer Agreement provides that upon written request for temporary custody to the appropriate authorities of the state in which the prisoner is incarcerated, the requesting state is entitled to have a prisoner made available. However, there is a further proviso in this section which allows for a thirty-day period after receipt of the request, within which the governor of the sending state may disapprove the request either upon his own motion or upon the motion of the prisoner. The Detainer Agreement also states in Article IX(7) that the authorities having custody of the prisoner shall promptly upon receipt of the written request notify the prisoner and the governor, in writing, that such a request has been made, describing its source and contents. The prisoner is also to be informed, in writing, "of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his delivery."

EXHIBIT 2.

The Detainer Agreement does not explicitly grant a prisoner a right to a pretransfer hearing before a court nor does there appear to be an implied right under the Agreement. It does, however, permit the prisoner to petition the governor of the sending state, a provision which appears to satisfy plaintiff's right to be heard under the Due Process Clause. Although nothing explicitly appears in the statute granting a prisoner the right to counsel before transfer to another state under the Detainer Agreement, the provision in Article IX which states the prisoner should be informed of his right to counsel implies that he does have such a right, contrary to defendants' unsupported statement in their memorandum of law

accompanying the motion to dismiss. The record is not clear as to whether plaintiff was informed of his rights to counsel, to make a motion to the governor or to contest his delivery to the New Jersey officials. Accordingly, defendants' motion to dismiss for failure to state a cause of action must be denied.

With respect to defendants Carey, Lefkowitz and Hongisto, however, there is no suggestion that any of the three were personally involved in the transfer or had personal knowledge of the incident of which plaintiff complains. It is settled law in this circuit that personal involvement of defendants is a predicate for § 1983 liability. McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978); Mukmuk v. Commissioner of Department of Correctional Services, 529 F.2d 272, 275 (2d Cir.), cert. denied, 426 U.S. 911 (1976). Therefore, in light of their lack of involvement in an apparently isolated incident, the complaint is dismissed as to these three defendants.

SO ORDERED.

DATED: New York, New York
November 5, 1979

Henry F. Werker
U. S. D. J.

EXHIBIT 2

NOTES

1. Defendants were sued in their official capacities as Governor of the State of New York, Attorney General of the State of New York, Commissioner of New York State Department of Corrections, and Superintendent of the Green Haven Correctional Facility, respectively.

2. N.Y. CRIM. PROC. LAW § 580.20 (McKinney 1971).

3. The plaintiff alleged violations under U.S. CONST. amend. I, IV, V, VI, VIII, IX, XIII and XIV.

4. Article I of the Interstate Agreement on Detainers sets forth the purpose and policy for the cooperative agreement. N.Y. CRIM. PROC. LAW § 580.20, Article I. (McKinney 1971).

EXHIBIT 2.

APPEARANCES:

RICHARD PAYTON, PRO SE
GreenHaven Correctional Facility
Stormville, New York 12582

Attorney for Defendants:

ROBERT ABRAMS
Attorney General
Two World Trade Center
New York, New York 10047

By: Paul E. Milbauer
Deputy Assistant Attorney General

EXHIBIT 2.

EXHIBIT 3

NEW YORK STATE CRIMINAL PROCEDURE LAW, SECTION 580.20 (TEXT ON THE INTERSTATE AGREEMENT DETAINER ACT." ARTICLES I, IV(d) AND IX(7)).

ARTICLE I

THE PARTY STATES FIND THAT CHARGES OUTSTANDING AGAINST A PRISONER, DETAINER BASED ON UNTRIED INDICTMENTS, INFORMATIONS OR COMPLAINTS, AND DIFFICULTIES IN SECURING SPEEDY TRIAL OF PERSONS ALREADY INCARCERATED IN OTHER JURISDICTIONS, PRODUCE UNCERTAINTIES WHICH OBSTRUCT PROGRAMS OF PRISONER TREATMENT AND REHABILITATION. ACCORDINGLY, IT IS THE POLICY OF THE PARTY STATES AND THE PURPOSE OF THIS AGREEMENT TO ENCOURAGE THE EXPEDITIOUS AND ORDERLY DISPOSITION OF SUCH CHARGES AND DETERMINATION OF THE PROPER STATUS OF ANY AND ALL DETAINERS BASED ON UNTRIED INDICTMENTS, INFORMATIONS OR COMPLAINTS. THE PARTY STATES ALSO FIND THAT PROCEEDINGS WITH REFERENCE TO SUCH CHARGES AND DETAINERS, WHEN EMANATING FROM ANOTHER JURISDICTION, CANNOT PROPERLY BE HAD IN THE ABSENCE OF COOPERATIVE PROCEDURES. IT IS THE FURTHER PURPOSE OF THIS AGREEMENT TO PROVIDE SUCH COOPERATIVE PROCEDURES.

ARTICLE IV(d)

NOTHING CONTAINED IN THIS ARTICLE SHALL BE CONSTRUED TO DEPRIVE ANY PRISONER OF ANY RIGHT WHICH HE MAY HAVE TO CONTEST THE LEGALITY OF HIS DELIVERY AS PROVIDED IN PARAGRAPH (a) HEREOF BUT SUCH DELIVERY MAY NOT BE OPPOSED OR DENIED ON THE GROUND THAT THE EXECUTIVE AUTHORITY OF THE SENDING STATE HAS NOT AFFIRMATIVELY CONSENTED TO ORDERED SUCH DELIVERY.

ARTICLE IX(7)

IN ORDER TO IMPLEMENT ARTICLE IV(a) OF THE AGREEMENT ON DETAINERS, AND IN THE FURTHERANCE OF ITS PURPOSE, THE APPROPRIATE AUTHORITIES HAVING CUSTODY OF THE PRISONER SHALL, PROMPTLY UPON RECEIPT OF THE OFFICER'S WRITTEN REQUEST, NOTIFY THE PRISONER AND THE GOVERNOR IN

EXHIBIT 3 (CONTINUED)

WRITING THAT A REQUEST FOR TEMPORARY CUSTODY HAS BEEN MADE AND SUCH NOTIFICATION SHALL DESCRIBE THE SOURCE AND CONTENTS OF SAID REQUEST. THE AUTHORITIES HAVING CUSTODY OF THE PRISONER SHALL ALSO ADVISE HIM IN WRITING OF HIS RIGHTS TO COUNSEL, TO MAKE REPRESENTATIONS TO THE GOVERNOR WITHIN THIRTY DAYS, AND TO CONTEST THE LEGALITY OF HIS DELIVERY.

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No. 80-6017

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

RICHARD PAYTON,

Petitioner-Plaintiff,

-against-

DAVID HARRIS,

Respondent-Defendant.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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of Counsel

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Question Presented

Whether this Court should exercise its discretion and grant certiorari to decide whether the Circuit Court properly affirmed the dismissal of petitioner's action?

No. 80-6017

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

RICHARD PAYTON,

Petitioner-Plaintiff,

-against-

DAVID HARRIS,

Respondent-Defendant.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Proceedings Below

The United States District Court for the Southern District of New York (Judge Henry F. Werker) dismissed petitioner's complaint brought pursuant to 42 U.S.C. § 1983 which sought injunctive and declaratory relief and damages regarding his transfer under the Interstate Agreement on Detainers (Detainer Agreement), New York Criminal Procedure Law § 580.20. Petitioner was transferred pursuant to this Agreement from the Green Haven Correctional Facility in New York to New Jersey

for trial there on criminal charges. On appeal to the Second Circuit Court of Appeals, petitioner challenged the absence of a pre-transfer hearing on both statutory and constitutional grounds and argued that District Judge Werker erred in his memorandum opinions dated November 5, 1979 and February 21, 1980 in granting judgment to defendant while material issues of fact were allegedly still in dispute. The memorandum decisions of Judge Werker dated November 5, 1979 and February 21, 1980 and the Second Circuit's decision of October 15, 1980, are annexed to petitioner's application for certiorari as Exhibits 2, 1, and A respectively.

Petitioner is presently serving a sentence of 20 years to life in the Green Haven Correctional Facility in New York for murder. After he was transferred to New Jersey in August 1978, he was convicted in that state of murder, assault, and other related crimes. These convictions were not challenged. Petitioner conceded that the only issues which would have been opened in the pre-transfer hearing he was allegedly denied under the Detainer Agreement were whether he had been substantially charged with a crime in the demanding state (New Jersey), whether he was a fugitive from that state, whether he was present in the demanding state at the time that the crime was committed, and whether the required papers were in order and he was, in fact, the person being charged. Michigan v. Doran, 439 U.S. 282, 289 (1978).

The Second Circuit found that given the verdict in New Jersey, all of these issues must be deemed substantially resolved against petitioner, indicating that even if he had

been afforded a pre-transfer hearing it would not have affected his current status, a conclusion reinforced by the failure of petitioner's counsel to take advantage of the hearing in New York on November 3, 1978. The Second Circuit declined to pass on the merits of petitioner's challenge to respondent's construction of the Detainer Agreement noting that the issue was presently sub judice in the United States Supreme Court in Adams v. Cuyler, 592 F. 2d 720 (3d Cir. 1979), cert. granted, 100 S. Ct. 1011 (1980 (argued October 7, 1980).*

The Second Circuit also determined that although the documentary evidence offered by respondent in the District Court might not have been sufficient to sustain the government's familiarity with the procedures of the Agreement, including his August 27, 1978 letter to the Governor of New Jersey, provided persuasive evidence that petitioner was, in fact, informed of all of his rights.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

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* This Court affirmed the Third Circuit's decision on January 21, 1981, holding that prisoners transferred pursuant to the Interstate Agreement on Detainers are entitled to a pre-transfer hearing. Cuyler v. Adams, ___ U.S. ___, 66 L. ed 2d 641, 101 S. Ct. ___ (Rehnquist, Burger, and Stewart, dissenting).

ARGUMENT

On January 21, 1981, this Court affirmed the decision of the Third Circuit in Cuyler v. Adams, ___ U.S. ___, 66 L. ed 2d 641, 101 S. Ct. ____. The opinion held that prisoners transferred pursuant to provisions of Article IV of the Detainer Agreement are entitled to a pre-transfer hearing before being transferred to another jurisdiction pursuant to Article IV of the Detainer Agreement, so that the prisoner, therefore, stated a claim for relief under 42 U.S.C. § 1983 when he asserted that State officials failed to grant him the requisite pre-transfer hearing.

Since the Third Circuit in Cuyler v. Adams, supra, held that prisoners are entitled to a pre-transfer hearing as a matter of statutory construction of the Detainer Agreement, this Court considered only that issue. The dissent viewed the Detainer Agreement as a State statute and would have deferred to the State court's interpretation of it. The dissent further noted that they would reverse and remand with instructions to the Court of Appeals to consider respondent's constitutional claims which were avoided by the Third Circuit by what the dissenters considered unjustifiable statutory interpretation.

It is the position of respondent in the instant case that the petition for certiorari should not be granted since the Court has already decided the issue. Furthermore, there is no need to reverse and remand for further consideration because the Second Circuit found the determination of this issue was not material.

After petitioner was transferred to New Jersey in August 1978, he was convicted in that state of murder, assault and other related crimes, convictions he expressly does not challenge. He concedes that the only issues which would have been open in the pre-transfer hearing he was denied under the Detainer Agreement were whether he had been substantially charged with a crime in the demanding state (New Jersey), whether he was a fugitive from that state, whether he was present in the demanding state at the time that the crime was committed, and whether the required papers were in order and he was, in fact, the person being charged. See Michigan v. Doran, 439 U.S. 282, 289 (1978).

The Second Circuit held that given the verdict in New Jersey, however, all of these issues must be deemed substantially resolved against petitioner, indicating that even if he had been afforded a pre-transfer hearing it would not have affected his current status, a conclusion reinforced by the failure of petitioner's counsel to take advantage of the hearing in New York on November 3, 1978.

At the time of petitioner's transfer (1978) respondent was operating in good faith and in the manner approved by the State courts. Notwithstanding the fact that this Court has recently interpreted the statute to include the right to a pre-transfer hearing, the denial of such in this case should be deemed harmless error. Petitioner suffered no damages as a result of his transfer. Any violation of petitioner's rights were statutory and hence, the complaint does not state a claim under 42 U.S.C. § 1983.

Finally, it must be pointed out that on October 27, 1978, petitioner, through his attorney Charles Clancy, moved before the Honorable Felix Martino, Superior Court of New Jersey, to dismiss his indictment because he was denied a transfer hearing. Although defense counsel could have appeared at the rescheduled hearing in Dutchess County, New York, by letter dated November 2, 1978, petitioner withdrew his motion to dismiss the indictment based upon an alleged defect in the detainer procedure. Any right to said hearing was, therefore, waived when petitioner did not pursue the hearing and withdrew his motion.

Rights under the Interstate Agreement on Detainers may be waived by a transfer request or by failure to assert the rights. These rights are purely statutory and as such need not be knowingly waived under Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
April 9, 1981

Respectfully submitted,

ROBERT ABRAMS
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Attorney for Respondent

GERALD J. RYAN
Assistant Attorney General

PAUL E. MILBAUER
Assistant Attorney General
of Counsel

BC

PAGE 3

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Supreme Court Of The United States
October Term. 1980

80-6017 **ORIGINAL COPY**

Richard Payton,
Petitioner

-Vs-

David R. Harris,
Respondent

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On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

"Petitioner's Reply To Defendant's
Memorandum" Opposing
Petition For Writ Of Certiorari

Appearance:

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(Friend And Legal Assistant
For The Petitioner)

Richard Payton. 78-A-0098
Drawer B.
Stormville, New York, 12582

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New York State: Criminal Procedure Law

(C.P.L. 580. 20 (Articles of the Interstate Agreement Detainer Act)

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Exhibits Attached Hereto

Exhibit A ..... Sworn Affidavit of Richard Payton
Sworn To October 24, 1980.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

80-6017

RICHARD PAYTON,
PETITIONER

-Vs-

DAVID R. HARRIS,
RESPONDENT

PRELIMINARY STATEMENT

NOW COMES, RICHARD PAYTON, THE PETITIONER, TO CLARIFY THE ISSUES WHICH IS PRESENTED IN HIS PETITION FOR WRIT OF CERTIORARI, BEFORE THIS COURT, PURSUANT TO RULE 22, SUBD (5), (6) (REPLY AND SUPPLEMENTAL BRIEF), OF THE SUPREME COURT RULES.

ARGUMENTATION

I

IN LIGHT OF ADAMS Vs COYLER, — U.S. —, 101 S.CT. 703 (1981). PRISONERS TRANSFERRED PURSUANT TO THE PROVISIONS (ARTICLES) OF THE AGREEMENT ARE NOT REQUIRED TO FORFEIT ANY PRE-EXISTING RIGHTS THEY MAY HAVE UNDER STATE OR FEDERAL LAW TO CHALLENGE THEIR TRANSFER TO THE RECIEVING STATE.

This Court Just Recently Affirmed the Decision Rendered in the case of Adams Vs Coyler, 592 F.2d. 720 (C.A.3. 1979), And Held in Coyler Vs Adams, —U.S.—, 101 S.Ct. 703, 712 (1981):

"

> The Remedial Purpose of the Agreement Supports An interpretation that give Prisoners the Right To A Judicial Hearing in which they can bring a Limited challenge to the Receiving State Custody Request. In Light of the Purpose of the Detainer Agreement, As Reflected in the Structure of the Agreement, And its Legislative History, We Conclude As a Matter of Federal Law That "Prisoners Transferred Pursuant To the Provisions of the Agreement Are Not Required to Forfeit Any Pre-Existing Rights They May Have Under State or Federal Law To Challenge their Transfer To the Receiving State." Respondent Adams Has therefore Stated a Claim for Relief Under 42 U.S.C. 1983 For the Asserted Violation By State officials of the Term of the Detainer Agreement (Cite omitted).

Accordingly, Under the Authority of Adams, the Petitioner (Payton) States a Claim For Relief (1) By Petitioner being unlawfully Removed From the State of New York (Green Haven Prison), Taken To the State of New Jersey, Prior To "Petitioner's Pre-Transfer Judicial Hearing" That was Schedule By the Court in New York (Dutchess County), in which Petitioner would Have Contested the Legality of His Delivery To the State of New Jersey And (2) As well As to the Provisions (Articles) of the Agreement which this case Specifically Entails, Concerning Petitioner's Cause of Action, which is Before this Court.

II

THE SECOND CIRCUIT PANEL MISSTATED THE FACTS, COUNSEL WAS ASKED DURING ARGUMENT TO REPRESENT, NOT WHETHER PETITIONER WOULD HAVE SUBMITTED AN AFFIDAVIT DENYING RECIPT OF PROPER NOTIFICATION UNDER THE AGREEMENT.

IN REGARD TO DEFENDANT'S EXHIBITS, SUBMITTED IN THE DISTRICT COURT. THE DISTRICT COURT PURPORTING TO TREAT DEFENDANT'S AFFIDAVIT AS A RENEWED MOTION TO DISMISSED, ISSUED A MEMORANDUM ENDORSEMENT AND ORDER DISMISSING THE COMPLAINT (APP. 95). THE DISTRICT COURT DID NOT SPECIFY WHICH PARTICULAR DOCUMENTS SUBMITTED BY THE ATTORNEY GENERAL SUPPORTED ITS CONCLUSION.

THE SECOND CIRCUIT PANEL'S CONCLUSION FINDS NO SUPPORT IN THE RECORD OR IN THE REPRESENTATIONS MADE DURING ARGUMENT BY APPELLANT'S COUNSEL (EXH. A.P. 2.) (ATTACHED TO PETITIONER'S WRIT OF CERTIORARI). CONTRARY TO THE PANEL'S DECISION, COUNSEL WAS ASKED DURING ARGUMENT TO REPRESENT, NOT WHETHER PETITIONER WOULD HAVE SUBMITTED AN AFFIDAVIT DENYING RECEIPT OF PROPER NOTIFICATION UNDER THE AGREEMENT, BUT WHETHER APPELLANT WOULD HAVE SUBMITTED AN AFFIDAVIT DENYING THAT HE HAD BEEN SHOWN EXHIBITS "B" AN "H" (APP. 41, 55-60) (EMPHASIS ADDED).

THE PETITIONER ATTACHES (TO THIS REPLY AND SUPPLEMENTAL BRIEF FOR PETITION FOR CERTIORARI), AN AFFIDAVIT SWORN TO ON OCTOBER 24, 1980, TO THE EFFECT THAT (1) HE WAS NOT SHOWN EXHIBIT B AND (2) THAT HE WAS NEVER ADVISED OF ANY OF HIS RIGHTS UNDER ARTICLE IX(7) OF THE AGREEMENT.

IN VIEW OF THE MISINTERPRETATION OF THE SECOND CIRCUIT PANEL, EXTRAORDINARY RELIANCE ON COUNSEL'S RELUCTANCE

TO MAKE A REPRENSENTATION DURING ARGUMENT, IN WHICH THE SECOND CIRCUIT PANEL, BELIEVE THAT THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR BY DISMISSING THE PETITIONER'S CIVIL RIGHT'S COMPLAINT (EXH. A.P. 2.) (SECOND CIRCUIT MADE THIS CONCLUSION (MISSTATED), BASED UPON COUNSEL'S RELUCTANCE TO MAKE A REPRESENTATION DURING ARGUMENT THAT GIVEN THE CHANCE, HIS CLIENT WOULD HAVE SUBMITTED AN AFFIDAVIT DENYING THAT HE HAD RECEIVED PROPER NOTIFICATION UNDER THE DETAINER AGREEMENT. EXH. A.P. 2).

THEREFORE, UNDER THE MISINTERPRETATION OF THE SECOND CIRCUIT PANEL, EXTRAORDINARY RELIANCE ON COUNSEL'S RELUCTANCE TO MAKE A REPRESENTATION DURING ARGUMENT.

THE PETITIONER'S BELIEVES, THAT THE SECOND CIRCUIT PANEL, DID COMMIT REVERSIBLE ERROR, IN THE AFFIRMANCE OF THE "DISTRICT COURT RENEWED MEMORANDUM" IN DISMISSING THE PETITIONER'S CIVIL RIGHT'S ACTION, AND THIS COURT SHOULD REVERSED THE DECISION OF THE SECOND CIRCUIT PANEL, RENDERED ON OCTOBER 15, 1980. SEE: EXHIBIT A.P. 2.

III

THE SECOND CIRCUIT PANEL FAILED TO APPLY THE CORRECT STANDARDS FOR SUMMARY JUDGMENT.

NONE OF THE EVIDENCE SUBMITTED SUBMITTED BY DEFENDANT IS COMPETENT EVEN TO DISPUTE THE ALLEGATION THAT PLAINTIFF-PETITIONER WAS NOT ADVISED OF HIS ARTICLE IX(1) RIGHTS. THE ONLY DOCUMENT WHICH EVEN MENTIONS A RIGHT TO PETITION THE GOVERNOR OF NEW YORK IS EXHIBIT "B" (APP. 41) WHICH CARRIES THE NOTATION "REFUSED TO SIGN 4/10/78 (THE FIRST MENTION IN THE COMPLAINT OF ANY NOTIFICATION TO PAYTON OF DETAINERS IS JUNE 5, 1978 (APP. 8).

A BOLD ASSERTION BY AN ANONYMOUS PARTY THAT PLAINTIFF "REFUSED TO SIGN" A PROLIX LEGAL DOCUMENT FAILS TO SATISFY ANY OF THE REQUIREMENTS OF RULE 56(e), THAT THE MATERIAL SUBMITTED (1) BE MADE ON THE AFFIANT'S PERSONAL KNOWLEDGE; (2) SHALL SET FORTH SUCH FACTS AS WOULD BE ADMISSIBLE IN EVIDENCE AND (3) SHALL SHOW AFFIRMATIVELY THAT THE AFFIANT IS COMPETENT TO TESTIFY TO THE MATTERS STATED THEREIN. SEE ALSO: FOOTNOTE 11, AT PAGE 14 OF THE PETITIONER'S WRIT OF CERTIORARI, FILED IN THIS COURT ON JANUARY 10, 1981 (EMPHASIS ADDED). REFUSAL TO SIGN THESE DOCUMENTS, EVEN IF ESTABLISHED, WOULD IN NO WAY SUGGEST THAT PETITIONER WAS MADE AWARE OF THEIR CONTENTS, WHICH IN ANY EVENT DO NOT FULLY SET FORTH THE ARTICLE IX(7) RIGHTS.

THIS CIRCUIT (SECOND) HAS HELD THAT SUMMARY JUDGMENT MAY NOT BE GRANTED WHERE THE MOVING PARTY FAILS TO MAKE AN INITIAL SHOWING THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT" EVEN THOUGH THE PARTY OPPOSING THE MOTION HAS SUBMITTED NO PROBATIVE EVIDENCE TO SUPPORT ITS POSITION OR ESTABLISH THAT THERE IS A GENUINE ISSUE FOR TRIAL". CF., UNITED STATES VS PENT-R-BOOKS, INC., 538 F. 2d. 519, 529 (C.A. 2. 1976), CITING ADICKES VS S.H. KRESS AN CO., 398 U.S. 144, 159-160 (1970). SINCE DEFENDANT HAS FAILED TO MAKE AN INITIAL SHOWING THAT PETITIONER WAS ADVISED OF ANY RIGHTS UNDER THE AGREEMENT, SUMMARY JUDGMENT WAS IN ERROR.

SECONDLY, WITHAL EVEN IF DEFENDANT'S SUBMISSION WERE COMPETENT TO PUT PAYTON'S ARTICLE IX(7) RIGHTS IN ISSUE, SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE PETITIONER WAS NOT GIVEN AN OPPURTUNITY TO SUBMIT COUNTER-AFFIDAVITS.

RULE 12(b) REQUIRES THAT IF COURT DOES NOT EXCLUDE MATTERS OUTSIDE THE PLEADINGS ON A MOTION TO DISMISS, THE MOTION MUST BE TREATED AS ONE FOR SUMMARY

JUDGMENT AND ALL PARTIES MUST BE GIVEN REASONABLE OPPORTUNITY TO PRESENT ALL MATERIAL PERTINENT TO SUCH A MOTION. THE SECOND CIRCUIT HAS HELD THAT THE TERM "REASONABLE OPPORTUNITY" IN RULE 12(b) INCLUDES NOTICE TO ALL PARTIES THAT THE COURT IS TREATING A 12(b)(6) MOTION AS ONE FOR SUMMARY JUDGMENT (EMPHASIS ADDED). CF. DALE VS HAHN, 440 F. 2d. 633, 638 (C.A. 2. 1971). SEE ALSO: JENSEN VS KLECKER, 599 F. 2d. 243, 245 (C.A. 8. 1979) (SAME STANDARDS APPLIES TO PRO SE LITIGANTS).

THE SECOND CIRCUIT PANEL, DID NOT REPUDIATE THE PROPOSITION THAT PAYTON WAS ENTITLED TO THE "REASONABLE OPPORTUNITY" SET FORTH IN RULE 12(b) AND DALE VS HAHN, SUPRA, BUT CONCLUDED THAT PAYTON, EVEN IF GIVEN SUCH AN OPPORTUNITY, WOULD NOT HAVE SUBMITTED AN AFFIDAVIT DENYING THAT HE HAD BEEN ADVISED OF HIS ARTICLE III(c) RIGHTS (THE COURT CONCLUSION, WAS MISSTATED INADVERTENTLY).

ACCORDINGLY, FROM THE ABOVE MENTION, THREE (3) REQUIREMENTS OF RULE 56(c) AND THE PRINCIPLES UNDER THE AUTHORITIES OF THE CASES, UNITED STATES VS PENT-R-BOOKS, SUPRA; ADICKES VS S.H. KRESS AN CO, SUPRA; DALE VS HAHN, SUPRA; JENSEN VS KLECKER, SUPRA. THE OPINION RENDERED BY THE SECOND CIRCUIT IN THE INSTANT CASE, SHOULD BE REVERSED BY THIS COURT, AS A MATTER OF LAW.

IV

DEFENDANT, DAVID R. HARRIS IS SUBJECT TO FEDERAL LAW, AS WELL AS, NOT BEING SO HIGH THAT HE IS ABOVE THE LAW.

IN REGARD TO THE TIME OF THIS ALLEGED INCIDENT, WHICH CREATED THE PETITIONER'S CAUSE OF ACTION.

Since Defendant, David R. Harris (Warden of Green Haven Prison), Taken the Position in telling the Petitioner over the telephone in the Green Haven Chaplain's office: "that Petitioner was going to New Jersey (unlawfully), willingly or unwillingly, Despite of the "Pre transfer Hearing" that was scheduled By the Supreme Court in Dutchess County (New York), in which the Petitioner could contest the Legality of his Delivery to the State of New Jersey.

However, Petitioner was Removed to the State of New Jersey unlawfully, Prior to his "Pre transfer Hearings" under the Agreement.

This Court Held in the case of Davis Vs Passman, —U.S.—, 99 S.Ct. 2264, 2277 (1979):

"

Our System of Jurisprudence on the Assumption that all individuals whatever their position in the goverment are subject to Federal Law: "No man in this country is so High that he is above the Law. No officer of the Law may set that Law at Defiance with impunity. All officers of the goverment, From the Highest to the Lowest are Creatures of the Law and are Bound to obey it."

Withal, Knowledge that Prison officials will be liable for all of its injurious Conduct.... Should Create incentive for officials who may Harbor Doubts about the Lawfulness of their intended Actions to err on the side of Protecting Prisoners Constitutional Rights. Cf., Owens Vs City of Independence, —U.S.—, 100 S.Ct. 1398, 1416 (1980).

A

The Courts Have To Set "Meaningful Adequate Guidelines" For "Prison Officials", In Effectuating That Prison Officials Will Not Defeat "Prisoners Rights", Of The Provisional Articles Under The Agreement.

Since Defendant (Herein) Has Create A Deliberate Indifference Under The Articles Of The Agreement (1) See: Affidavit By Petitioner, Sworn To On The 24th Day Of October 1980 (2) See: Footnote 11, At Page 14 Of Petitioner's Writ Of Certiorari, Filed In This Court On January 10, 1981, And (3) Because Prisoners Are Not In Any, Or No Position To Enforce The Laws Which They May Be Entitle To As A Matter Of Law.

Therefore, The Courts Have To Set "Meaningful Adequate Guidelines" For "Prison Officials" In Effectuating That Prison Officials Will Not Defeat, "Prisoners Rights" Of The Provisional Articles Under The Agreement (Emphasis Added), To Challenge Their Transfer To The Receiving State.

Conclusion

Wherefore, In All Respects To The Above Mentioning Arguments And Under The Integrity Of The American Jurisprudence, Which Purports To Be One Of Justice, Not Merely Of Law. The Decision Rendered By The United States Court Of Appeals, For The Second Circuit On October 15, 1980., Should Be Reversed And Remanded By This Court, With Further Instruction To The Second Circuit, In The Further Dealings With The Petitioner Cause Of Action.

I ALSO UNDERSTAND THAT A FALSE STATEMENT IN THIS PETITION WILL SUBJECT ME TO THE PENALTIES FOR PERJURY.

RESPECTFULLY SUBMITTED
Oliver Gicla West Jr
976 EAST 45 STREET
BROOKLYN NEW YORK, 11203
(FRIEND AND LEGAL ASSISTANT
FOR THE PETITIONER)

PETITIONER: RICHARD PAYTON. 78-A-0098
DRAWER B.
STORMVILLE, NEW YORK, 12582

SWORN TO BEFORE ME THIS
14th DAY OF April 1981

STELE LORIN
Notary Public, State of New York
No. 31-4655600
Qualified in New York County
Commission Expires March 30, 1982

Stele Lorin

CERTIFICATE OF SERVICE

STATE OF NEW YORK) SS:
COUNTY OF KINGS)

NOW COMES, OLIVER GICLA WEST JR, FRIEND AND LEGAL ASSISTANT TO THE PETITIONER (RICHARD PAYTON), FIRST BEING DULY SWORN AND SAYS: THAT I HEREBY CERTIFY THAT I HAVE SERVE A DUPLICATE COPY OF THE PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF, ON THE RESPONDENT BY MAILING SAME TO HIM IN A DULY FRONKED ENVELOPED ADDRESSED AS FOLLOWS:

(1) Hon. Robert Abrams (Att. Gen. N.Y. State)
Two World Trade Center
New York, New York 10047.

To Send By The United States Mail (Via), To Send To The Above Party.

Respectfully Submitted
Oliver Wade West Jr
976 East 45th Street
Brooklyn, New York, 11203
(Friend And Legal Assistant
For The Petitioner)

Petitioner: Richard Payton. 78-A-0098
Drawer B.
Stormville, New York, 12582

Sworn To Before Me This
16th Day Of April 1981

STELL LORIN
Notary Public, State of New York
No. 31-4630000
Qualified In New York County
Commission Expires March 30, 1982

Stell Lorin

Appendix

Affidavit of Richard Payton,

Sworn to October 24, 1980

EXHIBIT A

UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

- x

RICHARD PAYTON, :

Plaintiff-Appellant, : No. 80-2086

-against- :

DAVID HARRIS, : AFFIDAVIT

Defendant-Respondent. :

- x

STATE OF NEW YORK)
ss.:
COUNTY OF DUTCHESS)

RICHARD PAYTON, being duly sworn, deposes and says that:

1. I am the plaintiff-appellant in the above-captioned appeal and am currently an inmate in the Greenhaven Correctional Facility, Stormville, New York. I submit this Affidavit in support of my petition for a rehearing of this appeal.

2. On April 10, 1978, I was incarcerated in the Clinton Correctional Facility at Dannemora, New York.

3. On April 10, 1978, a corrections officer appeared at my cell with a piece of paper and requested that I sign it. I asked the officer what were the contents of the paper, but the officer merely repeated his request that I sign it. I informed the officer that I would not sign the paper unless I knew what it said. The officer thereupon turned around and walked away without ever having informed me of the paper's contents.

EXHIBIT A

4. I have never read the document entitled "Agreement on Detainers: Form I", submitted by defendant Harris as Exhibit "B" (Appendix to Appellant's Brief at 41), nor did anyone communicate to me that the document set forth the right to petition the Governor of New York to disapprove a request for temporary custody.

5. I was never informed prior to my transfer to New Jersey of my rights under Article IX(7) of the Interstate Agreement on Detainers (the "Agreement") to counsel, to make representations to the Governor of New York within thirty days and to contest the legality of my delivery.

6. Prior to my transfer to New Jersey, I was not aware of the rights granted by Article IX(7) of the Agreement. I was not aware of any right to petition the Governor of New York. I did attempt unsuccessfully to secure the assistance of counsel, but did not know that the Agreement required it. My transfer to New Jersey one week prior to a scheduled hearing in Dutchess County Supreme Court denied me the opportunity to contest the legality of delivery.

7. Accordingly, I respectfully request that a rehearing of this Appeal be granted and that on rehearing granted this Court's opinion dated October 15, 1980 be withdrawn and the Court enter a new opinion reversing the judgment of the District Court and remanding the cause to the District Court for further proceedings.

EXHIBIT A

8. The contents of this Affidavit are true to the best of my knowledge and belief and are based on my personal knowledge.

Richard Payton
Richard Payton

Sworn to before me this
24 day of October, 1980

Esmond W. Gifford
Notary Public

ESMOND W. GIFFORD, SR.
Notary Public, State of New York
Dutchess County
My Commission Expires March 30, 1981

EXHIBIT A